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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DAVID VINCENT CARSON,
12 CDCR #T-30386,

13 Plaintiff,

14 vs.

15 F. MARTINEZ, et al.,

16 Defendants.
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Case No.: 3:16-cv-01736-JLS-BLM

**ORDER GRANTING MOTION
TO APPOINT PRO BONO
COUNSEL PURSUANT
TO 28 U.S.C. § 1915(e)(1)
AND S.D. CAL. GEN. ORDER 596**

(ECF No. 94)

18 Plaintiff David Vincent Carson, a prisoner currently incarcerated at the Correctional
19 Training Facility (“CTF”) in Soledad, California, is proceeding pro se and has been granted
20 leave to proceed *in forma pauperis* in this civil action filed pursuant to 42 U.S.C. § 1983.
21 (See ECF No. 3.)

22 **BACKGROUND**

23 Currently pending before the Court is Carson’s Amended Complaint (“FAC”) which
24 alleges constitutional violations against several correctional officials employed at Richard
25 J. Donovan Correctional Facility in San Diego. (See FAC, ECF No. 35.) On September
26 3, 2019, the Court granted in part and denied in part a motion for summary judgment
27 brought on behalf of Defendants Garcia, Martinez, and Casian. (See ECF No. 83.)
28

1 On October 18, 2019, Carson filed a Motion to Appoint Counsel, and requesting the
2 Court consider his need for assistance in light of the upcoming trial. (*See* ECF No. 94.)

3 DISCUSSION

4 Although there is no right to counsel in a civil action, a court may under “exceptional
5 circumstances” exercise its discretion and “request an attorney to represent any person
6 unable to afford counsel.” 28 U.S.C. § 1915(e)(1); *Palmer v. Valdez*, 560 F.3d 965, 970
7 (9th Cir. 2009). The court must consider both “the likelihood of success on the merits as
8 well as the ability of the [Plaintiff] to articulate his claims *pro se* in light of the complexity
9 of the legal issues involved.” *Id.* (quoting *Weyandt v. Look*, 718 F.2d 952, 954 (9th Cir.
10 1983)).

11 While Carson has so far demonstrated an ability to articulate his claims, amend his
12 pleading, engage in discovery, and to partially survive summary judgment while
13 proceeding without counsel, his likelihood of success on the merits—at least with respect
14 to his retaliation, excessive force, and failure to protect claims—increased as a result of the
15 Court’s September 3, 2019 summary judgment Order. *Cf. Garcia v. Smith*, 2012 WL
16 2499003, at *3 (S.D. Cal. 2012) (finding it “too early to determine the likelihood of success
17 on the merits” when it was “not certain whether plaintiff’s complaint would survive
18 [defendant’s pending motion for] summary judgment.”).

19 In light of the impending trial, the Court has elected to exercise its discretion
20 pursuant to 28 U.S.C. § 1915(e)(1), and has requested volunteer pro bono counsel for
21 purposes of representing Carson at trial and during any further proceedings before the
22 Court in this case under the provisions of this Court’s “Plan for the Representation of Pro
23 Bono Litigation in Civil Case filed in the Southern District of California,” and General
24 Order 596. The Pro Bono Plan specifically provides for appointment of pro bono counsel
25 “as a matter of course for purposes of trial in each prisoner civil rights case where summary
26 judgment has been denied.” *See* S.D. Cal. Gen. Order 596. Plaintiff qualifies for a pro
27 bono referral under the Plan because he is an indigent prisoner, and summary judgment has
28 been partially denied. (*See* ECF Nos. 3, 91.) Thus, because the Court finds the ends of

1 justice would be served by the appointment of pro bono counsel under the circumstances,
2 it referred Carson's case to a volunteer lawyer on the Court's Pro Bono Panel. On
3 November 18, 2019, that volunteer graciously agreed to represent Carson pro bono during
4 the course of all further proceedings held before this Court in this case. *See* S.D. Cal. Gen.
5 Order 596.

6 **CONCLUSION & ORDER**

7 For the foregoing reasons, the Court **GRANTS** Carson's Motion for Appointment
8 of Counsel pursuant to 28 U.S.C. § 1915(e)(1) (ECF No. 94) and **APPOINTS** James D.
9 Crosby, Esq., SBN 110383, 550 West C Street, Suite 790, San Diego, California, 92101,
10 as Pro Bono Counsel to represent him.

11 Pursuant to S.D. Cal. CivLR 83.3.f.2, Pro Bono Counsel must file, within fourteen
12 (14) days of this Order, if possible and in light of Carson's incarceration at CTF, a formal
13 written Notice of Substitution of Attorney signed by both Carson and his newly appointed
14 counsel. This Notice of Substitution will be considered approved by the Court upon filing,
15 and Pro Bono Counsel will thereafter be considered attorney of record for Carson for all
16 purposes *during further proceedings before this Court, in this matter only, and at the*
17 *Court's specific request. See* S.D. Cal. CivLR 83.3.f.1, 2.¹

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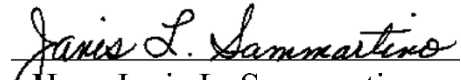
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23 ¹ Carson is cautioned, however, that the Court's Pro Bono Panel is a precious and limited
24 resource. The fact that the Court has found this case suitable for appointment at this stage
25 of the proceedings, and has been able to locate an available volunteer attorney does not
26 entitle him to the appointment of counsel in this or any other case. Nor does it permit
27 Carson an attorney of his choosing, or guarantee him any subsequent Pro Bono Panel
28 referral or appointment. *See Hedges v. Resolution Tr. Corp*, 32 F.3d 1360, 1363 (9th Cir.
1994) ("[T]here is no absolute right to counsel in civil proceedings.") (citation omitted);
United States ex rel Gardner v. Madden, 352 F.2d 792, 793 (9th Cir. 1965) (noting that the
appointment of counsel in a civil case "is a privilege and not a right.").

1 The Court further **DIRECTS** the Clerk of the Court to serve Mr. Crosby with a
2 copy of this Order at the address listed above upon filing. *See* S.D. Cal. CivLR 83.3.f.2.

3 **IT IS SO ORDERED.**

4 Dated: November 21, 2019


Hon. Janis L. Sammartino
United States District Judge